Supreme Court, U.S.
FILED

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No.: _____

In the

SUPREME COURT OF THE UNITED STATES

In Re: WALTER RHEAMS, appearing through his duly qualified curator, HELEN RHEAMS, TAMMY RHEAMS, individually, JAMILAH MONET RHEAMS, through ALISHA MONIQUE THOMAS, and MR. and MRS. CECIL HARPER, *Petitioners*,

v.

OFFICER VICTOR MARLER, OFFICER JASON POE, S.A. LARRY JONES, SHERIFF WILLIE GRAVES, UNITED STATES OF AMERICA, and UNITED NATIONAL INSURANCE COMPANY, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petition for Writ of Certiorari

Donna U. Grodner, Esq.
GRODNER & ASSOCIATES
2223 Quail Run Drive, Suite B-1
Baton Rouge, Louisiana 70808
Telephone: (225) 769-1919

Counsel for Petitioners

QUESTIONS PRESENTED

I. **May a trial court stay or dismiss an action brought under the provisions of 42 U.S.C. § 1983 on the basis that there are pending state criminal charges for which the petitioner may never stand trial due to his physical incapacity?**

II. **What is the bright-line test for determining whether a petitioner's right to relief under mandamus is clear and indisputable?**

PARTIES TO THE PROCEEDING

The following individuals are parties to the proceeding in the courts below:

Walter James Rheams, appearing through his duly qualified curator, Helen Rheams, Tammy Rheams, individually, Jamilah Monet Rheams, through Alisha Monique Thomas, and Mr. and Mrs. Cecil Harper; *Plaintiffs-Appellants*;

Officer Victor Marler, Officer Jason Poe, Special Agent Larry Jones, Sheriff Willie Graves, the United States of America, and United National Insurance Company; *Defendants-Appellees*.

CORPORATION DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, by information and belief, Defendant-Appellee United National Insurance Company is a Pennsylvania-based corporation wholly owned by the United National Group, likewise, a Pennsylvania corporation. Sup. Ct. R. 29.6.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Walter James Rheams, appearing through his duly qualified curator, Helen Rheams, Tammy Rheams, individually, Jamilah Monet Rheams, through Alisha Monique Thomas, and Mr. and Mrs. Cecil Harper respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinions of the Court of Appeal for the Fifth Circuit (App. A) and the District Court for the Middle District of Louisiana (App. B) are not yet reported.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 16, 2002. Plaintiff-Appellants' petition for rehearing *en banc* was denied by that court on May 28, 2002. Thus, this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

42 U.S.C. § 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such

officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."

STATEMENT OF THE CASE

I. Relevant Factual History

On the evening of September 21, 2000, Walter James Rheams, an African-American male, domiciled in East Baton Rouge Parish, Louisiana, crossed the parish line into East Baton Rouge Parish from Livingston Parish and entered the drive-way to Torrey Pines Trailer Park located in the city of Baton Rouge, Louisiana. At that time, Officers Victor Marler and Jason Poe, who were commissioned by the Violent Crimes Task Force division of the Federal Bureau of Investigation and under the supervision of Special Agent Larry Jones, attempted to apprehend Mr. Rheams in the execution of a bench warrant issued in a state court matter. It should be noted that both officers were operating unmarked vehicles at the time of this arrest.

In attempting to take Mr. Rheams into custody, said officers fired numerous shots into the back of the vehicle being driven by Mr. Rheams, who was unarmed. As a result of this barrage of gunfire, Mr. Rheams was shot in the back of the neck and his spinal cord was severed.

Due to this injury, Mr. Rheams was paralyzed from the neck down and must breathe with the assistance of a ventilator. As such, his vocal capacities are significantly limited. Not surprisingly, Mr. Rheams' ability to communicate with others regarding past events is all but non-existent.

Suit was filed on Mr. Rheams' behalf in state court against the officers for their use of excessive force. This action was then removed to the United States District Court for the Middle District of Louisiana.

Further, on July 12, 2002, the Honorable Bonnie

Jackson of Louisiana's Nineteenth Judicial District Court ruled that Mr. Rheams lacked the capacity to assist his counsel at trial and ordered that the criminal proceedings arising from his alleged attempt to murder the two officers by running his vehicle over them be held in abeyance until such time as he was able to stand trial. Otherwise, presumably said prosecution will remain open until Mr. Rheams passes away. (See App. C).

II. Relevant Procedural History

On November 1, 2000, suit was brought in Louisiana's Nineteenth Judicial District Court in and for the Parish of East Baton Rouge alleging violations of civil rights as well as other state and federal causes of action. The matter was thereafter removed to the United States District Court for the Middle District of Louisiana.

Thereafter, Plaintiffs sought production of documents from various law enforcement agencies including the East Baton Rouge Parish Sheriff's Department, the Tri-Parish Task Force, the Louisiana State Police Crime Lab, and the Louisiana State Police. The Plaintiffs' attempts, however, were met with motions to quash the subpoenas issued to the respective agencies.

On March 1, 2002, a status conference was held in the chambers of the magistrate wherein the issue was raised of whether subpoenas issued by the Plaintiffs in this matter would be quashed due to the pendency of criminal proceedings involving Plaintiff Walter James Rheams in Louisiana's Nineteenth Judicial District Court. Rather than handing down a ruling upon this issue at that time, the magistrate instructed the participants in the conference to submit briefs in support of their positions on the matter. As was understood, the deadline for submitting memoranda in support of quashing the Plaintiffs' subpoenas was Monday, March 11, with the following Monday, March

18, 2002, as the deadline for the Plaintiffs to respond to said memoranda.

On March 8, 2002, the East Baton Rouge Sheriff's Department timely filed its *Memorandum in Support of Objection and Motion to Quash Subpoena,* which sought to quash the Plaintiffs' subpoena directed to Deputy Don Strickland of the East Baton Rouge Parish Sheriff's Department. On March 15, 2002, the Plaintiffs submitted their *Memorandum in Opposition to Defense Motions to Quash Subpoenas* in response to the brief of the Sheriff's Department. However, prior to the Plaintiffs' submission of their memorandum, the trial court, on March 14, 2002 issued an *Order* granting the Sheriff's Department's motion to quash the subpoena directed to Deputy Strickland. At the time that the Plaintiffs submitted their brief, on March 15, 2002, as directed by the magistrate, they had not yet received notice of the Judge's previous *Order* of March 14, 2002.

As they were not afforded an opportunity to present their position prior to the district court's ruling, the *Plaintiffs' Motion to Alter or Amend Judgment of March 14, 2002* was timely filed in accordance with Rules 59 and 60 of the Federal Rules of Civil Procedure seeking the Court's reconsideration after the Plaintiffs had an opportunity to be heard as well. Despite the these efforts, on April 1, 2002, the trial court issued its *Judgment* in which it dismissed this matter pursuant to the Supreme Court's decision in the matter of Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (6/24/94). The trial court, however, in its ruling stated that, "if, for some reason, Heck does not apply, this case is stayed pending completion of the state court criminal proceedings which form the basis of this civil action." (See App. B).

On April 3, 2002, the Plaintiffs filed their *Petition for Writ of Mandamus to the United States District Court*

for the Middle District of Louisiana with the United States Court of Appeals for the Fifth Circuit seeking that the matter be ordered to proceed due to the fact that there was no basis for staying discovery or any other portion of this matter based upon the pending state court criminal proceedings. The Fifth Circuit denied the writ on April 16, 2002. (See App. A). Thereafter, the Plaintiffs' request for rehearing *en banc* was denied on May 28, 2002.

REASONS FOR GRANTING THE PETITION

I. The lower courts failed to follow the controlling authority of this Court.

The Panel, in denying the Petitioners' writ application, failed to adhere to the principles of law set forth by the Supreme Court in the matters of Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (6/24/94) and Edwards v. Balisok, 520 U.S. 641, 117 S.Ct. 1584, 137 L.Ed.2d 906 (5/19/97) as well as the state law applicable to Walter James Rheams' competency to stand trial.

In denying the Plaintiffs' petition for a writ of mandamus, the Fifth Circuit wrote:

> The Supreme Court indicated in Heck that there can be no § 1983 suit for damages for an alleged unreasonable seizure under the Fourth Amendment (which is exactly what Rheams's case is), **after the plaintiff is convicted of resisting arrest**. See Heck, 512 U.S. at 486 n. 6. The court defined resisting arrest as "intentionally preventing a peace officer from effecting a *lawful* arrest." Id. Rheams's case is similar to this and thus Heck indicates that his

> private suit would be barred if he were convicted. Therefore **we do not think that he can challenge the charges pending against him prior to their being invalidated**. [Emphasis added]. (See App. A).

This finding is erroneous for three reasons. First, Mr. Rheams has not been charged with resisting arrest; second, Heck was concerned not with pending criminal charges, but with outstanding criminal convictions; and finally, besides Heck, the appellate court failed to consider Edwards and other controlling precedents.

In reaching its decision to deny the writ application in this matter, the court of appeal ignored this Court's ruling in the matter of Edwards v. Balisok, 520 U.S. 641, 117 S.Ct. 1584, 137 L.Ed.2d 906 (5/19/97), wherein this Court specifically addressed whether § 1983 actions should be dismissed pending final disposition of parallel criminal proceedings and found, as a matter of law, that dismissal of a 42 U.S.C. § 1983 claim on the basis of a parallel state court criminal proceeding was error.

In an apparent effort to justify the action of the trial court, rather than relying on the ruling in Heck, the court of appeal looked to the doctrine set forth in the matter of Colorado River Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976); this doctrine, however, is inapplicable to Mr. Rheam's matter. In Colorado River, Justice Brennan wrote:

> "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication

> of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." (Citing County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-189, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163, 1166 (1959)).

Colorado River Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976).

As an abstention doctrine, Colorado River, may only be applied in extraordinary cases where a *lis pendens* situation (which does not lie between state and federal court cases) is presented.

In the matter of Gulfstream Aerospace Corporation v. Mayacamas Corp., 485 U.S. 271, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988), a buyer brought a first-filed contract action against the seller in state court. In turn, the seller brought suit on the contract against the buyer in federal court. The buyer sought dismissal of the second-filed federal court action on the basis of the Colorado River Abstention, which this Court found inapplicable:

> **This Court held in Colorado River that a federal court should stay or dismiss an action because of the pendency only in "exceptional" circumstances**, 424 U.S., at 818, 96 S.Ct., at 1246-47, and with **"the clearest of justifications,"** Id., at 819, 96 S.Ct., at 1247. . . . This Court never has intimated acceptance of petitioner's view that the decision of a party to spurn removal and bring a separate suit in federal court invariably

> warrants the stay or dismissal of the suit under the Colorado River doctrine. Moreover, petitioner has pointed to no other circumstance in this case that would require a federal court to stay the litigation. [Emphasis added by this author].

Thus, although Gulfstream appeared to have been a clear-cut case where the so-called "Colorado River Abstention" should have applied, this Court held otherwise, cautioning that this doctrine should only be applied in exceptional circumstances. In the matter at bar, no exceptional circumstances have been or can be shown. Moreover, in the present case, Mr. Rheams lacks capacity to proceed in the criminal trial due to the injuries that he has sustained.

Similarly in the matter of Murphy v. Uncle Ben's, Inc., 168 F.3d 734 (5th Cir. 2/25/99), the Fifth Circuit found that the trial court in that matter had abused its discretion in abstaining from hearing a Title VII age discrimination claim by staying that action pending resolution of a civil action filed by the same claimant in state court pursuant to a state statute that was analogous to Title VII. In reaching this determination, that court wrote:

> Because of the "virtual unflagging obligation of the federal courts to exercise the jurisdiction given them" as between state and federal courts, the rule is that "'the pendency of an action in state court is no bar to proceedings concerning the same matter in the Federal Court having jurisdiction.'" Colorado River, 424 U.S. at 817, 96 S.Ct. at 1236 (quoting McClellan v. Carlend, 217 U.S. 268, 282, 30 S.Ct. 501, 54 L.Ed. 762 (1910)). However, in

> "extraordinary and narrow" circumstances, a district court may abstain from exercising jurisdiction over a case when there is a concurrent state proceeding, based on considerations of "'[w]ise judicial administration, giving regard to conservation of jdicial resources and comprehensive disposition of litigation.'" Id. at 813, 816, 96 S.Ct. 1236 (quoting Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183, 73 S.Ct. 219, 96 L.Ed. 200 (1952)).

In the present matter, both the court of appeals and the district court failed to find extraordinary and narrow circumstances such as those that would even approach the standard set forth by this Court in Colorado River.

Additionally, this Court, in the matter of Deakins v. Monaghan, 484 U.S. 193, 108 S.Ct. 523, 98 L.Ed.2d 529 (1988), addressed the propriety of dismissing a § 1983 case on the basis of the abstention set forth in Younger v. Harris, 701 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) due to the pendency of a parallel state court criminal matter and found that dismissal of the § 1983 action was error. Recognizing that a state criminal proceeding may only provide equitable relief any action for damages would necessarily be separate, the Deakins Court, at 484 U.S. at 204 ruled:

> Even if the Younger doctrine required abstention here, **the District Court had no discretion to dismiss rather than to stay respondents' claims for monetary relief that cannot be redressed in the state court proceeding**. . . First, the speculation that the District Court, if allowed to retain jurisdiction, would "hover" intrusively about the state

> proceeding is based on the groundless assumption that the District Court would not hold up its end of the comity bargain. **Second, even if Pennhurst State Sch. and Hosp. V. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), would prevent the District Court from adjudicating respondents' state-law claims as petitioners contend, this would not require the dismissal of respondents' federal damages claims, which are substantial and sufficient to justify the District Court's retention of jurisdiction.** [Emphasis added by this author].

Thus, in the matter *sub judice*, the trial court had no legal discretion to dismiss Mr. Rheams' § 1983 action.

In Heck, mention was made of the Colorado River holding; in Edwards v. Balisok, 520 U.S. 641, 117 S.Ct. 1589, 137 L.Ed.2d 906 (5/19/97), Justice Scalia specifically condemned as statutorily infirm any orders staying a §1983 action pending the outcomes of parallel state court criminal proceedings. See Edwards, supra, at 520 U.S. at 649, 117 S.Ct. at 1589.

> Since we are remanding, **we must add a word concerning the District Court' s decision to stay this § 1983 action** while respondent sought restoration of his good-time credits, rather than dismiss it. **The District Court was of the view that once a respondent had exhausted his state remedies, the § 1983 action could proceed.** [Citations omitted.] **This was error. We reemphasize that § 1983**

> **contains no judicially imposed exhaustion requirement**, Heck, 512 U.S. at 481, 483, 114 S.Ct. at 2369, 2370-2371; **absent some other bar to the suit, a claim either is cognizable under § 1983 and should immediately go forward**, or it is not cognizable and should be dismissed. [Emphasis added].

Therefore, it is clear that the appellate court's reliance on Justice Scalia's Colorado River footnote was in error. As stated by this Court in Edwards, a claim that is cognizable under § 1983, such as the matter *sub judice*, should immediately go forward.

Additionally, the Edwards Court reemphasized that "§ 1983 contains no judicially imposed exhaustion requirement." In this case, by requiring disposition of the state court criminal proceeding prior to the adjudication of this action, the district court and the appellate court imposed the same judicially imposed exhaustion that the Edwards Court had declared infirm.

Both of the lower courts erred in finding that either or both a stay or dismissal of Mr. Rheams' § 1983 claim was legally permissible. Absent any basis to dismiss an action, it must proceed. Therefore, it was error for the district court to dismiss or stay any aspect of this action pending resolution of the state court criminal charges against Walter James Rheams.

II. The lower courts failed to consider the physical condition of Walter James Rheams, which renders him unable to stand trial; thus, no valid conviction may be obtained.

Notwithstanding the appellate court's mention of Mr. Rheams' paralysis in the introductory language of the April 16, 2002 writ denial, (See App. A), it is readily

evident that the true impact of Mr. Rheams' condition was not applied in the equation employed in determining that the Petitioners had not appropriately shown that they were entitled to relief under mandamus. As stated in the original petition in this matter, during his apprehension, Walter James Rheams was shot in the back of the neck, thus becoming paralyzed from the neck down. He is permanently dependant on a mechanical ventilator and has only minimal vocal capability. Furthermore, and perhaps most importantly, this condition is permanent. Pursuant to the state court's finding on July 12, 2002, Mr. Rheams is not competent to stand trial criminally. (See App. C).

Prior to this finding, during a hearing on March 19, 2002 in the state court matter, the Assistant District Attorney commented on the record that the State of Louisiana was not concerned with Mr. Rheams' condition, but that the criminal prosecution was to proceed due to the fact that attorneys involved in the federal court civil matter (the instant case) had been in contact with the District Attorney's office and requested that the prosecution be pressed so as to prevent discovery in the § 1983 action.

Clearly, the Respondents herein are pressuring the prosecution in the state criminal matter to proceed against an individual known to be incompetent to stand trial. Such tactics are a gross perversion of justice, if not a direct abuse of process.

In finding a stay proper, the lower courts fell into error in failing to consider the inescapable fact that Walter James Rheams will never be competent to stand trial criminally in state court; thus, although charges may remain in abeyance and pending against him, he will never be prosecuted. Conventional wisdom therefore dictates that "final disposition" of the state charges which would allow the stay to be lifted in the § 1983 action will only occur upon Mr. Rheams' death.

To suggest that Mr. Rheams may only bring a § 1983 action (or have one brought on his behalf) after his death is error and creates legal and logical absurdity. Therefore, justice may only be served pursuant to review by this Honorable Court.

III. The Petitioners' right to relief under a writ of mandamus is clear and indisputable.

As correctly stated by the appellate court in its Order of April 16, 2002, mandamus is an extraordinary remedy which should only be granted if a petitioner can show his right thereto is clear and indisputable. It has been long recognized that mandamus is appropriate when a trial court has declined to exercise its jurisdiction or has clearly and indisputably abused its discretion as to compel prompt intervention by the appellate court. In re Terra Intern, Inc., 134 F.3d 302 (5th Cir. 1/26/98); U.S. v. Mulderig, 120 F.3d 154 (5th Cir. 8/15/97); In re Dresser Industries, Inc., 972 F.2d 540 (5th Cir. 8/21/92); Warren v. Bergeron, 831 F.2d 101 (5th Cir. 11/4/87). Applying this well established rationale to the matter *sub judice*, being that the trial court has dismissed the Petitioners' claims *in globo*, the prompt intervention of the appellate court was appropriate.

Herein, the trial court, in its *Order* of April 1, 2002, and on its own motion, dismissed the claims of the Petitioners based upon its erroneous finding that dismissal was required by the rule of law set forth by the Supreme Court. (See App. B)

As referenced in the appellate court's ruling of April 16, 2002, Heck, at 512 U.S. 486-487 provides:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused

> by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983 . . .

As is indicated in the foregoing language, Heck's primary concern is the preservation of previously obtained **convictions**. In the instant matter, no conviction can be obtained in the pending criminal proceedings against Walter James Rheams due to the fact that, because of the injuries he sustained after being shot in the back by the officers, he lacks the capacity to stand trial.

The linchpin of Heck is set forth, 512 U.S. at 486, 114 S.Ct. at 2370, as follows:

> We think the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement, just as it has always applied to actions for malicious prosecution.

Thus, the Supreme Court was concerned with "finality and consistency" and "has generally declined to expand opportunities for collateral attack." Heck, 512

U.S. at 485, 114 S.Ct. at 2370. The test set forth by the Heck case is as follows:

> But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any **outstanding criminal judgment** against the plaintiff, the action should be allowed to proceed. Heck, 512 U.S. at 487, 114 S.Ct. at 2372. [**emphasis** added]

Thus, with regard to this case, the Defendants and state authorities which seek the protection of Heck must point out at least one "outstanding criminal judgment against the plaintiff" which may be invalidated by a final judgment rendered in this § 1983 action. This has not and cannot be done; thus, the Defendants have failed to meet the Heck burden. Nonetheless, the district court summarily disposed of the Petitioners' claims either dismissing them pursuant to the misapplication of Heck or staying the proceedings pending the resolution of the criminal matters.

This failure of the trial court to make a concrete determination as to how exactly it was to dispose of this matter constitutes an abuse of its discretion as well as its recalcitrant failure to exercise its jurisdiction. Further, such a convoluted judgment serves to prejudice the Petitioner's interest by confusion as to what the true status of the proceedings are -- stayed or dismissed.

This paradox, though specifically set forth in the appellate court's April 16, 2002 *Order*, was not addressed as a judicial irregularity. Therefore the appellate court fell into error by failing to compel the district court to take an affirmative stance on what its ruling actually was.

The trial court's misinterpretation of Heck's applicability to the facts of this case, especially when

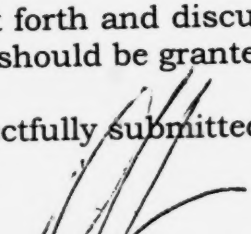
compounded with its apparent reluctance to issue a clear ruling, demonstrates a glaring abuse of discretion which has served to immeasurably prejudice the Petitioners herein. Therefore, the Petitioners' clear and indisputable right to relief under the extraordinary remedy of mandamus is apparent.

The appellate court's failure to apprehend these issues in reaching its determination constitutes error such that a rehearing of this matter is warranted. Therefore, the Petitioner herein so requests that this Court review this matter.

CONCLUSION

For the reasons set forth and discussed herein, the Petition for Certiorari should be granted.

Respectfully submitted,



Donna U. Grodner,
Counsel of Record
Grodner & Associates
2223 Quail Run Drive,
Suite B-1
Baton Rouge, Louisiana 70808
Telephone: (225) 769-1919
Facsimile: (225) 769-1997

APPENDIX

A. Opinion of the court of appeal.

B. Opinion of the trial court.

C. Minute entry from the state court on the pending criminal action.

U.S. COURT OF APPEALS
FILED
APR 16 2002
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-30340

In Re: HELEN RHEAMS, on behalf of Walter James Rheams; TAMMY RHEAMS; ALISHA MONIQUE THOMAS, on behalf of Jamilah Monet Rheams; CECIL HARPER; UNKNOWN HARPER, Mrs.,

Petitioners.

Petitioner for Writ of Mandamus to the United States District Court for the Middle District of Louisiana, Baton Rouge

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Before JOLLY and STEWART, Circuit Judges.

BY THE COURT[1]

Petitioners have appealed to this court for a writ of mandamus pursuant to 28 U.S.C. § 1651. They challenge the dismissal of their 42 U.S.C. § 1983 excessive use of force lawsuit against the respondents, arising out of the attempted arrest and shooting of

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[1] This order is being entered by a quorum of this court pursuant to 28 U.S.C. § 46(d).

Walter J. Rheams.[2] Rheams was paralyzed as a result. A criminal prosecution is also pending against Rheams in Louisiana state court for attempted first degree murder as a result of this incident. The district court found that because there was a pending state court criminal charge against Rheams that also formed the basis of his civil suit, dismissal was required by Heck v. Humphrey, 512 U.S. 477 (1994). Alternatively, the court found that if Heck does not apply, the case should be stayed pending the outcome of the criminal proceedings.

A writ of mandamus is an "extraordinary remedy." Adams v. Georgia Gulf Corp., 237 F.3d 538, 542 (5th Cir. 2001). We will grant a writ of mandamus "only if the petitioner can show its right to the writ is clear and undisputable. Mandamus is appropriate when the trial court has exceeded its jurisdiction or has declined to exercise it, or when the trial court so clearly and indisputably abused its discretion as to compel prompt intervention by the appellate court." In re Dresser Industries, Inc., 972 F.2d 540, 542-43 (5th Cir. 1992) (citations omitted). Mandamus is not a substitute for appeal. A judgment dismissing the case has been entered by the district court, and Rheams can appeal his case via that route.[3]

Rheams has not shown that he has a clear and indisputable rights to the writ here. In Heck, the Supreme Court held that:

> [I]n order to recover damages for allegedly unconstitutional conviction or

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[2] Rheams also states that he asserted a malicious prosecution claim.

[3] Although Rheams argues in his petition "the dismissal is presumably without prejudice and is thus, not a final judgment," the district court's judgment clearly disposed of the entire case and is final, regardless of whether it is with prejudice or not.

> imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983 . . . .But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

512 U.S. at 486-87. As an example of a damages suit "for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid," the Court described the following:

> An example of this [ ] category -- a § 1983 action that does not seek damages directly attributable to conviction or confinement but whose successful prosecution would necessarily imply that the plaintiff's criminal conviction was wrongful-- would be the following: A state defendant is convicted of and sentenced for the crime of resisting arrest, defined as intentionally preventing a peace officer from effecting a lawful arrest. He then brings a § 1983 action against the arresting officer, seeking

> damages for violation of his Fourth Amendment right to be free from unreasonable seizures. In order to prevail in this § 1983 action, he would have to negate an element of the offense of which he has been convicted. Regardless of the state law concerning res judicata, [ ] the § 1983 action will not lie.

Id. at 486 n. 6. As an example of "some other bar to the suit," the Court noted: "if a state criminal defendant brings a federal civil-rights lawsuit during the pendency of his criminal trial, appeal, or state habeas action, abstentation may be an appropriate response to the parallel state-court proceeding." Id. at 487 n. 8. (citing Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976)).

The officers claim that during their attempt to arrest Rheams pursuant to a warrant, Rheams drove his vehicle at them (i.e. used it as a deadly weapon), and that they shot at him in self-defense. Rheams claims that he was "ambushed: by the police, and that as he was attempting to drive around a car that was in his way, another car blocked him and the officers opened fire. In Heck, the plaintiff had already been convicted of a crime and brought a civil suit which called into doubt the validity of that conviction. Although Rheams has nto yet been convicted of a crime, we think that the principle of Heck applies and that Rheams cannot bring a civil suit that de facto challenges the validity of the criminal proceedings against him until, as in Heck, the criminal proceedings have been resolved in his favor. Therefore, we must examine whether Heck's civil suit challenges the validity of the attempted first-degree murder charges that have been brought against him.

The Louisiana code defines first-degree murder in part as: "When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman, [or] peace officer . . . or when the specific intent to kill of inflict

great bodily harm is directly related to the victim's status as a fireman, peace officer, or civilian employee." La. Rev. State. § 14:30(2). The Louisiana code defines attempt as follows: "Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under these circumstances, he would have actually accomplished his purpose." La. Rev. Stat. § 14:27(A).

To succeed on an excessive force claim under 42 U.S.C. § 1983, a plaintiff bears the burden of showing: "(1) an injury (2) which resulted directly from the use of force that was excessive to the need and (3) the force used was ojectively unreasonable." Glenn v. City of Tyler, 242 F.3d 307, 314 (5th Cir. 2001) (citations and internal quotation marks omitted). "It is well settled that if a law enforcement officer uses excessive force in the course of making an arrest, the Fourth Amendment guarantee against unreasonable seizure is implicated." Harper v. Harris County, Tex., 21 F.3d 597, 600 (5th Cir. 1994 (citation omitted).

Rheams's excessive force claim would challenge the validity of the attempted first-degree murder conviction if he were convicted; i.e it would have been shown by the conviction that he had the specific intent to kill or to inflict great bodily harm upon a peace officer. In a § 1983 suit, Rheams would have to show that the force used was excessive to the need and was objectively unreasonable. However, if he was trying to kill the police officers, then it is hard to say that the force used by the police was excessive to the need. The Supreme Court indicated in Heck that there can be no § 1983 suit for damages for an unreasonable seizure under the Fourth Amendment (which is exactly what Rheams's case is), after the plaintiff is convicted of resisting arrest. See Heck, 512 U.S. at 486 n. 6. The court defined resisting arrest as "intentionally preventing a peace

officer from effecting a *lawful* arrest." Id. Rheams's case is similar to this and thus Heck indicates that his private suit would be barred if he were convicted. Therefore, we do not think that he can challenge the charges pending against him prior to their being invalidated.

Even if Heck does not apply, the district court may abstain from deciding this case, which indicates that Rheams does not have a clear right to a writ of mandamus. The Supreme Court indicated in Heck that in situations identical to this one, "abstention may be an appropriate response to parallel state-court proceedings." Heck, 512 U.S. at 487 n. 8. (Citing Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976)). In Colorado River, the Supreme Court state that abstention may be appropriate based on

> principles . . . which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts. These principles rest on considerations of '(w)ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.' Generally, as between state and federal courts, the rule is that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction . . . .'

424 U.S. at 817 (citations omitted). Given that the result of Rheams's criminal prosecution would determine whether his civil suit should even go forward, it would conserve judicial resources and further the comprehensive disposition of litigation to have the state court suit proceed, and to abstain from or stay the

federal court suit until afterward.

In sum, Rheams has not shown that he has a clear right to the writ of mandamus. Therefore, the petition for a writ of mandamus is

DENIED.

FILED
U.S. DIST. COURT
MIDDLE DISTRICT L.A.
02 APR. PM 2:12
SIGN _____
by DEPUTY CLERK

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

WALTER JAMES RHEAMS, ET AL CIVIL ACTION

VERSUS NUMBER 00-912-B-M2

OFFICER VICTOR MARLER

ORDER

On March 14, 2002 the Court issued an order requiring the parties to submit briefs on whether Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364 (1994) applies under the facts of this case. The parties have timely filed briefs on this issue.

The plaintiffs have also filed a motion seeking to have the Court reconsider its March 14, 2002 order. Because of the Court's ruling, this motion is denied as moot.

Since the record is clear that the plaintiff Walter James Rheams does have a pending state court criminal charge which also forms the basis of plaintiffs' civil suit. Heck clearly applies.

If, for some reason, Heck does not apply, the Court believes this case should be stayed pending completion of the state court criminal proceedings.

Judgment shall be entered accordingly.

Baton Rouge, Louisiana, April 1, 2002.

s/ Frank J. Polozola
FRANK J. POLOZOLA, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

DKT. & ENTERED

DATE 4/1/02
NOTICE MAILED TO:
DATE ____ BY NMI

FJP
KC
Grodner
Hightower
Vincent

FRIDAY, JUNE 12, 2002

THE NINETEENTH JUDICIAL DISTRICT COURT, CRIMINAL SECTION IV, THE HONORABLE BONNIE JACKSON, JUDGE PRESIDING, WAS OPENED PURSUANT TO ADJOURNMENT. PRESENT IN COURT: MS KELLI TERRELL AND MS. KIM BROOKS, ASSISTANT DISTRICT ATTORNEYS; MS KATHY ROSS, COURT REPORTER; AND MS ALRET CANNON, MINUTE CLERK.

* * *

NO. 01-00-29
NO. 04-00-217
NO. 10-00-464
STATE OF LOUISIANA
VS.
WALTER J. RHEAMS

RE: STATUS CONFERENCE

CHARGE: POSSESSION OF MARIJUANA; FAILURE TO STOP; ATTEMPTED SECOND DEGREE MURDER; ATTEMPTED FIRST DEGREE MURDER (TWO COUNTS). This matter came before the Court for status, pursuant to previous assignment. The accused was represented bu Mr. James Standley. Ms. Kim Brooks, Assistant District Attorney, was present for the State of Louisiana. This matter came before the Court on a continuation of argument and ruling on the accused's capacity to assist counsel in his defense. The matter was submitted to the Court with argument from both counsel for the accused and counsel for the state. For oral reasons assigned, the Court found that the accused was incapable of assisting counsel in a defense. The Court ordered that the prosecution of this matter be held in abeyance until such time that the accused is capable of assisting counsel in his defense. On motion

of the state, the Court ordered that this matter be assigned for status on January 3, 2003 at 9:00 a.m.

Supreme Court, U.S.
FILED
OCT 29 2002
CLERK

No. 02-185

In The

Supreme Court of the United States

In Re: WALTER JAMES RHEAMS, appearing through his duly qualified curator, HELEN RHEAMS, TAMMY RHEAMS, individually, JAMILAH MONET RHEAMS through ALISHA MONIQUE THOMAS, and MR. and MRS. CECIL HARPER,

Petitioners,

v.

OFFICER VICTOR MARLER, OFFICER JASON POE, S.A. LARRY JONES, SHERIFF WILLIE GRAVES, UNITED STATES OF AMERICA, and UNITED NATIONAL INSURANCE COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SCOTT G. VINCENT, ESQ.
530 Natchez Street, Suite 325
New Orleans, Louisiana 70130
Telephone: (504) 596-2131
Counsel of Record for Respondent Tri-Parish Task Force

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES TO THE PROCEEDINGS

In addition to the parties listed by Petitioners, an additional party warrants mention. Victor Marler, one of the arresting officers in the arrest at issue in this litigation, is alleged to have been employed by the Tri-Parish Task Force (hereinafter referred to as "the Task Force"). The lawsuit alleges that Officer Marler had a history of complaints of police brutality filed against him and was unfit for the job but the Task Force nevertheless hired him with full knowledge of his background and that the Task Force was on notice that Officer Marler would be involved in a wrongful shooting incident much like the one in dispute in these proceedings. The lawsuit further alleges that the Task Force lacked authority to make an arrest outside of its jurisdiction and that Officer Marler was unsupervised.

Notwithstanding these allegations of wrongdoing made against the Task Force, the lawsuit does not name the Task Force as a party to the litigation. The Task Force is a necessary party to the present proceedings for two reasons. First, a subpoena duces tecum was served on the Task Force at the outset of the litigation to produce reports, records, and statements relating to the Rheams arrest. The Task Force filed a motion to quash asserting that the subpoenaed records are privileged from production. Prior to ruling on the motion to quash, the court stayed all discovery in the action. Subsequently, the district court dismissed the lawsuit in its entirety, thereby rendering the subpoena moot. The Task Force has an interest in upholding the dismissal of this action so that it will not have to comply with the subpoena served on it.

PARTIES TO THE PROCEEDINGS – Continued

Secondly, and more pertinent, the Task Force was served with the March 14, 2002 Order issued by the district court directing the parties to file memoranda as to whether *Heck v. Humphrey* applies under the facts of the present case. In compliance with this Order, the Task Force submitted a memorandum of authorities on the issue. The Task Force was the only party to argue that *Heck* applies to this lawsuit and requires that the action be dismissed. Consistent with the argument advanced by the Task Force, the district court dismissed the action. Petitioners served the Task Force with the Petition for Writ of Mandamus filed with the Fifth Circuit Court of Appeals, as well as with the Notice of Appeal. The Task Force was also served with the Petition for Writ of Certiorari filed in these proceedings.

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CITATION OF ORDER UNDER REVIEW

The opinion from which Petitioners seek certiorari is an unpublished opinion of the United States Fifth Circuit Court of Appeals filed on April 16, 2002 in the following captioned proceedings:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-30340

In Re: HELEN RHEAMS, on behalf of Walter James Rheams; TAMMY RHEAMS; ALISHA MONIQUE THOMAS, on behalf of Jamilah Monet Rheams; CECIL HARPER; UNKNOWN HARPER, Mrs., Petitioners

The Opinion is reproduced in Petitioners' Appendix to their Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

This Honorable Court should decline the exercise of its supervisory jurisdiction as Petitioners have failed to cite any compelling reasons for doing so as required by Rule 10 of the Rules of the Supreme Court of the United States. Rule 10 also mandates that "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

The United States Court of Appeals for the Fifth Circuit properly denied Petitioners' Petition for Writ of Mandamus and properly denied Petitioners' petition for rehearing *en banc*. Petitioners now ask this Court to make those same factual and legal determinations that the Court of Appeals made.

STATEMENT OF THE CASE

The present litigation arises out of the attempted arrest and shooting of Walter J. Rheams ("Rheams") by law enforcement officers on September 21, 2000. Livingston Parish Deputy Sheriff Victor Marler and Louisiana State Trooper Jason Poe went to the Torrey Pines Trailer Park in Baton Rouge, Louisiana, on that date to arrest Rheams pursuant to a bench warrant issued a week earlier on charges of attempted second degree murder. In the course of executing the warrant, Rheams attempted to run down Deputy Marler and Trooper Poe with his vehicle. Acting in self-defense, the officers shot Rheams. A bullet struck Rheams in the back of his neck, severing his spinal cord. Due to his injury, Rheams is paralyzed from the neck down and can breathe only with the assistance of a ventilator.

Detective Leonardo Moore, the East Baton Rouge Parish Sheriff's Office Detective who investigated the incident, submitted a sworn warrant application to Judge Carl A. Guidry of the Nineteenth Judicial District for the Parish of East Baton Rouge on September 22, 2000. Judge Guidry issued an arrest warrant against Rheams on two (2) counts of attempted first degree murder. Rheams was arrested later the same day at the Summit Hospital where he was being treated for injuries sustained in the shooting and placed in custodial arrest of the hospital.

Rheams asserted pressure on the East Baton Rouge Parish District Attorney's Office to bring criminal charges against Officers Marler and Poe. To this end, the District Attorney's Office presented the case against the officers to the East Baton Rouge Parish Grand Jury on December 7, 2000. The Grand Jury returned a no true bill on the

charges, clearing the officers of any criminal wrongdoing. The District Attorney's Office issued a bill of information against Rheams on October 16, 2001, charging him with two (2) counts of attempted first degree murder.

Plaintiffs filed their Petition for Damages in the Nineteenth Judicial District Court for the Parish of East Baton Rouge, State of Louisiana, on November 1, 2000. According to the allegations of the Petition, the officers lacked probable cause to arrest Rheams and had only a bench warrant for failure to appear in a domestic matter. The Petition further alleges that the officers ambushed Rheams and shot him for no reason. The state action was timely removed to the United States District Court for the Middle District of Louisiana.

Rheams moved to have the criminal charges against him dismissed on the basis that his medical condition prohibits him from effectively assisting his counsel at trial. To this end, he filed a motion for appointment of sanity commission. In support of this motion, Rheams submitted a letter from his treating physician confirming his paralysis, his dependence on a mechanical ventilator, and his minimal vocal capacity. The matter was presented to the court on June 12, 2002. Based on the medical report, the state court held the prosecution in abeyance until such time as Rheams becomes capable of assisting in his defense and scheduled a status conference on January 3, 2003 to monitor his condition. The court minutes are reproduced in Appendix C to the Petition for Writ of Certiorari.[1]

[1] The capacity hearing was conducted after the federal district court dismissed the civil action, and therefore, the court minutes are not a

(Continued on following page)

In the meantime, by Order issued on March 14, 2002, the federal district court ordered the parties to file written memoranda to address the issue of whether the rule established in *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), applies under the circumstances of the present action. In compliance with the district court's Order, Respondent, the Tri-Parish Task Force, filed a memorandum addressing the issue. In its memorandum, the Tri-Parish Task Force argued that, under the authority of *Heck v. Humphrey*, the pending criminal charges require that the civil litigation be dismissed. By Order entered on April 1, 2002, the trial court held that *Heck* applies and dismissed the civil action. Alternatively, the court found that if *Heck* does not apply, the case should be stayed pending the outcome of the criminal proceedings.

On April 3, 2002, Petitioners applied to the United States Court of Appeals for the Fifth Circuit for a writ of mandamus pursuant to 28 U.S.C. § 1651. By opinion issued on April 16, 2002, the Fifth Circuit denied the writ application, affirming the trial court's ruling that the case is governed by *Heck*. Petitioners filed a petition for rehearing *en banc*, which was denied on May 28, 2002. In the meantime, Petitioners appealed the order of dismissal on

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part of the trial record in this litigation. An appellate court may not consider evidence which is not part of the record, nor can it receive evidence to supplement the record. *New Haven Inclusion Cases*, 399 U.S. 392, 450 n. 66, 90 S.Ct. 2054, 26 L.Ed.2d 691 (1970); *Thomson v. Gaskill*, 315 U.S. 442, 446, 62 S.Ct. 673, 86 L.Ed. 951 (1942); *Witters v. Washington Dept. of Serv. for the Blind*, 474 U.S. 481, 486 n. 3, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986); *In re Brogna*, 589 F.2d 24, 27 n. 3 (1st Cir. 1978); *United States v. Febus*, 218 F.3d 784, 795 (7th Cir. 2000).

April 11, 2002. The appeal is presently pending in the United States Fifth Circuit Court of Appeals. Petitioners filed their Petition for Writ of Certiorari in the present proceedings on July 30, 2002.

SUMMARY OF ARGUMENT

A writ of mandamus is an extraordinary remedy. Mandamus is generally appropriate only when the lower court has exceeded its jurisdiction or has declined to exercise it, or when the court has so clearly and indisputably abused its discretion as to compel prompt intervention by the higher court. In order to prevail on a petition for writ of mandamus, a petitioner must show that his right to the writ is clear and undisputable. The decision of a district court to defer to a related state action is discretionary. As such, the right of the litigant to proceed in the federal action under such circumstances cannot be said to be clear and indisputable.

In the present action, criminal charges are pending against Rheams relating to his September 21, 2000 confrontation with the police. District Judge Polozola's decision to dismiss the federal action pending the resolution of the criminal charges was well within his discretion. Accordingly, mandamus is not appropriate under the circumstances.

In addition to applying to the Fifth Circuit for a writ of mandamus, Petitioners filed an appeal. The Notice of Appeal is reproduced in the Appendix to this Brief. The object of both the mandamus and appellate proceedings is the order dismissing the action. A litigant may not use mandamus proceedings as a substitute for appeal.

In any event, the ruling of the district court, as affirmed by the Fifth Circuit, is correct. Petitioners argue that the *Heck* rule applies only when there has been a conviction and does apply when criminal charges are merely pending. While the plaintiff in *Heck* admittedly had been convicted, this Court remarked that dismissal of a civil rights action would be appropriate where "some other bar to the suit" exists, offering as an example of such a bar the scenario where "a state criminal defendant brings a federal civil-rights lawsuit during the pendency of his criminal trial, appeal, or state habeas action." 512 U.S. at 487 & n. 6. The *Heck* court clearly envisioned the dismissal of a civil rights action where criminal charges are pending against the plaintiff.

Petitioners further argue that the *Heck* rule applies only when the civil plaintiff has been charged (and convicted) with resisting arrest and does not apply when the plaintiff is charged with attempted murder. This argument lacks merit. The petitioner in *Heck* was charged with manslaughter, not resisting arrest. The pertinent inquiry under *Heck* is whether the civil suit challenges the validity of the criminal proceedings. Because self-defense serves as a valid defense to the offense of attempted murder under Louisiana criminal law, Rheams' excessive force claim implicates the validity of the attempted murder charges pending against him.

This action is also subject to dismissal under state law concepts of issue and claim preclusion. The *Heck* court expressly recognized the potential application of state preclusion law as a bar to federal civil litigation:

> We also decline to pursue, without implying the nonexistence of, another issue, suggested by the Court of Appeals' statement that, if petitioner's

> conviction were proper, this suit would in all likelihood be barred by res judicata. The res judicata effect of state-court decisions in § 1983 actions is a matter of state law.

Heck, 512 U.S. at 480 n. 2. A federal court must apply state law principles of preclusion. Under Louisiana law, the determination of probable cause in the course of criminal proceedings bars a related civil action for false arrest. For this reason, the findings of probable cause in the criminal proceedings against Rheams bar Petitioners' claims of false arrest and excessive force in this litigation.

The Bill of Information filed against Rheams, in and of itself, is fatal to the action. Under state law, the filing of a bill of information is prima facie evidence of probable cause, which may be rebutted by evidence that the bill of information was obtained by fraud, perjury, or other corrupt means. There are no such allegations in Petitioners' lawsuit. Moreover, the chain of causation for false arrest is broken by the return of an indictment, unless it can be shown that the deliberations of the grand jury or the district attorney were in some way tainted by fraudulent and corrupt practices of the defendant. There are no allegations of such improprieties made in the present lawsuit.

ARGUMENT AND AUTHORITIES

I. THE APPELLATE COURT PROPERLY DENIED THE PETITION FOR WRIT OF MANDAMUS

The writ of mandamus is an extraordinary remedy, to be reserved for extraordinary situations. *Kerr v. United States District Court,* 426 U.S. 394, 96 S.Ct. 2119, 48

L.Ed.2d 725 (1976). The federal courts have traditionally used the writ only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. Mandamus is reserved for those situations in which the trial court has exceeded its jurisdiction or has declined to exercise it or when the trial court has so clearly and indisputably abused its discretion as to compel prompt intervention by the appellate court. *United States v. Mulderig,* 120 F.3d 534 (5th Cir. 1997); *Marinechance Shipping Ltd. v. Sebastian*, 143 F.3d 216 (5th Cir. 1998). In accordance with this historic practice, this Honorable Court has held that only exceptional circumstances amounting to a judicial usurpation of power will justify issuance of the writ of mandamus. *Gulfstream Aerospace Corp. v. Mayacamas Corp.,* 485 U.S. 271, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988).

A party seeking issuance of the writ must have no other adequate means to obtain the relief he desires and must satisfy the burden of showing that his right to the writ is clear and indisputable. *Conrad v. Colorado*, 28 Fed. Appx. 789 (10th Cir. 2001); *Gold v. Johns-Manville Sales Corp,* 723 F.2d 1068 (3rd Cir. 1983) (mandamus not available merely as a result of difficulties associated with proceeding to trial). Where an appellate court has before it both an appeal and a petition for mandamus and the order sought to be reviewed is properly reviewable by way of appeal, the appellate court must review the order through appeal rather than mandamus. *In re Kozeny,* 236 F.3d 615 (10th Cir. 2000). In other words, the avenues of appeal and mandamus are mutually exclusive, and thus, if an appeal is proper, mandamus may not be used as a substitute for appeal, "even though hardship may result from delay."

Bankers Life & Cas. Co. v Holland, 346 U.S. 379, 383, 74 S.Ct. 145, 98 L.Ed. 2d 106 (1953); *Moses H. Cone Memorial Hosp. v. Mercury Const.*, 460 U.S. 1, 8 n. 6, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (citing *Hines v. D'Artois*, 531 F.2d 726, 732 n. 10 (5th Cir. 1976)). *See also Lamb v. Principi*, 284 F.3d 1378 (Fed. Cir. 2002); *A-Cos Leasing Corp. v. Ingraham*, 408 F.2d 492 (5th Cir. 1969).

When there is substantive litigation pending in both the state and federal courts, the decision of the district court to defer the action to the state court is largely committed to the discretion of the district court. Where a matter is committed to the discretion of the court, it cannot be said that a litigant's right to the matter is "clear and indisputable." Accordingly, Petitioners' right to proceed with their action in federal court is not clear and indisputable.

Throughout this litigation, Petitioners complain that the civil proceedings must proceed in an expedited fashion and without delay because of Rheams' precarious health condition. According to Petitioners, the only way the criminal charges will be resolved, which in turn will reactivate the civil action, is by Rheams' death. The potential death of a litigant prior to the conclusion of litigation is not a risk unique to the present litigation. This hardship is routinely faced by litigants, especially in complex litigation. This Court responded to a similar argument in *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 98 S.Ct. 2552, 57 L. Ed.2d 504 (1978), as follows: "[T]he delay in adjudicating [the litigation] is simply a product of the normal excessive load of business in the District Court." 437 U.S. at 667, 98 S.Ct. at 2559, 57 L.Ed.2d at 514. *See also Kmart Corp. v. Aronds*, 123 F.3d 297 (5th Cir. 1997)

(federal civil RICO case stayed indefinitely pending resolution of related criminal matter).

II. *HECK* REQUIRES THAT AN ACTION FOR FALSE ARREST BE DISMISSED WHILE CRIMINAL CHARGES ARISING OUT OF THE ARREST ARE PENDING

In *Heck*, this Court held that an action which challenges the validity of a conviction or sentence must be dismissed until such time as the conviction or sentence is reversed or set aside. Petitioners argue that this rule is limited strictly to instances where there has been a conviction and does not apply when criminal charges are merely pending. Petitioners' argument lacks merit.

In *Heck*, this Court held that:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, *or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid*, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. . . . But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of *some other bar to the suit*.

512 U.S. at 486-87, 114 S.Ct. 2364, 129 L.Ed.2d 383. As an example of a damages suit "for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid," the Court described the following:

> An example of this [ ] category – a § 1983 action that does not seek damages directly attributable to conviction or confinement but whose successful prosecution would necessarily imply that the plaintiff's criminal conviction was wrongful – would be the following: A state defendant is convicted of and sentenced for the crime of resisting arrest, defined as intentionally preventing a peace officer from effecting a lawful arrest. He then brings a § 1983 action against the arresting officer, seeking damages for violation of his Fourth Amendment right to be free from unreasonable seizures. In order to prevail in this § 1983 action, he would have to negate an element of the offense of which he has been convicted. Regardless of the state law concerning res judicata, [] the § 1983 action will not lie.

Id. at 486 n. 6. As an example of "some other bar to the suit," this Court noted: "if a state criminal defendant brings a federal civil-rights lawsuit during the pendency of his criminal trial, appeal, or state habeas action, abstention may be an appropriate response to the parallel state-court proceedings." *Id.* at 487 n. 8 (citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)).

The Louisiana code defines first-degree murder in part as: "When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman, [or] peace officer . . . or when the specific intent to kill or to inflict great bodily harm is directly related to the victim's status

as a fireman, peace officer, or civilian employee." LSA-R.S. 14:30(2). The Louisiana code defines attempt as follows: "Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose." LSA-R.S. 14:27(A).

To succeed on excessive force claim under 42 U.S.C. § 1983, a plaintiff bears the burden of showing: "(1) an injury (2) which resulted directly and only from the use of force that was excessive to the need and (3) the force used was objectively unreasonable." *Glenn v. City of Tyler*, 242 F.3d 307, 314 (5th Cir. 2001) (citations and internal quotation marks omitted). "It is well settled that if a law enforcement officer uses excessive force in the course of making an arrest, the Fourth Amendment guarantee against unreasonable seizure is implicated." *Harper v. Harris County, Tex.*, 21 F.3d 597, 600 (5th Cir. 1994) (citation omitted).

Under the Louisiana code, self-defense serves as a valid defense to the offense of attempted murder. Because of this defense, a conviction on charges of attempted murder is inconsistent with a claim that the officers used excessive force in making the arrest. For this reason, Rheams's excessive force claim would challenge the validity of the attempted murder conviction if he were convicted.

The United States Court of Appeals for the Fifth Circuit applied Louisiana law to bar a claim for excessive force where the plaintiff was convicted of battery of a

police officer in *Hudson v. Hughes,* 98 F.3d 868 (5th Cir. 1996):

> Hudson was arrested and convicted of battery of an officer. In Louisiana, self-defense is a justification defense to the crime of battery of an officer. *See* LSA-R.S. 14:19; *Louisiana v. Blancaneaux*, 535 So.2d 1341 (La. App. 1988) (discussing justification defense to battery of officer conviction). To make out a justification defense, the criminal defendant charged with battery of an officer must show that his use of force against an officer was both reasonable and necessary to prevent a forcible offense against himself. *Blancaneaux*, 535 So.2d at 1342. Because self-defense is a justification defense to the crime of battery of an officer, Hudson's claim that Officers Defillo, Hingle, and Lanasa used excessive force while apprehending him, if proved, necessarily would imply the invalidity of his arrest and conviction for battery of an officer. This is true because the question whether the police applied reasonable force in arresting him depends in part on the degree of his resistance, which in turn will place in issue whether his resistance (the basis of his conviction for assaulting a police officer) was justified, which, if it were, necessarily undermines that conviction. We conclude therefore that to the extent that Hudson seeks to recover from the City of New Orleans and Officers Defillo, Hingle, and Lanasa for the defendants' alleged use of excessive force during his arrest, his § 1983 action may not proceed.

Hudson, supra at 873 (footnotes omitted). This holding is in line with the caselaw of the majority of jurisdictions which holds that a conviction on charges of resisting arrest or battery of a police officer bars an action for false arrest

and excessive force. *See Simmons v. O'Brien*, 77 F.3d 1093 (8th Cir. 1996); *Franklin v. County of Riverside*, 971 F.Supp. 1332 (C.D. Cal. 1997) (§ 1983 claim of excessive force implied invalidity of plaintiff's convictions for obstruction of a peace officer and assault on a peace officer and thus were barred under *Heck*); *Crooms v. P.O. Mercado, No. 41*, 955 F.Supp. 985, 988 (N.D. Ill. 1997) ("*Heck* bars [the plaintiff's] § 1983 action because a successful prosecution of his § 1983 claim would necessarily imply that his criminal conviction for resisting a police officer was wrongful."); *Gray v. Farley*, 13 F.3d 142 (4th Cir. 1993) (collateral estoppel barred inmate's § 1983 excessive force claim where issue of whether inmate had been beaten and his confession coerced had been tried in suppression hearing in state court); *Nelson v. Jashurek*, 109 F.3d 142 (3rd Cir. 1997); *Jones v. City of St. Louis*, 92 F.Supp.2d 949 (E.D. Mo. 2000) (conviction for assault of police officer conclusively established reasonableness of force used by police); *Holder v. Ivanjack*, 93 F.Supp.2d 933 (N.D. Ill. 2000) (arrestee's claim of excessive force necessarily implied invalidity of conviction for resisting a police officer).

Petitioners attempt to distinguish the jurisprudence cited above by pointing out that Rheams has been charged with attempted first degree murder, not resisting arrest or battery of an officer. In other words, Rheams' attempt to run over the officers is not related to the officers' attempts to apprehend and subdue him. Accordingly, Petitioners argue, even a conviction on the attempted murder charges would have no bearing on the present civil action.

The courts have upheld the use of deadly force by the police and dismissed claims of excessive force based on *Heck*. In *Hainze v. Richards*, 207 F.3d 795 (5th Cir. 2000),

rehearing en banc denied, 216 F.3d 1081 (5th Cir. 2000), and *Sappington v. Bartee,* 195 F.3d 234 (5th Cir. 1999), the Fifth Circuit held that an excessive force claim under § 1983 is barred as a matter of law if brought by an individual convicted of aggravated assault arising out of the same occurrence. In *Hainze*, a police officer shot a suspect two times in the chest who was 4-6 feet away from him and holding a knife. Thus, as in *Hainze* and *Sappington*, the force used by Deputy Marler and Trooper Poe to restrain Rheams, up to and including deadly force, cannot be deemed excessive.

III. PETITIONERS' CLAIMS OF FALSE ARREST AND EXCESSIVE FORCE ARE BARRED UNDER STATE LAW PRINCIPLES OF RES JUDICATA, COLLATERAL ESTOPPEL, AND ISSUE PRECLUSION

This Court recognized in *Heck* the potential application of state preclusion concepts as a bar to § 1983 actions:

> We also decline to pursue, without implying the nonexistence of, another issue, suggested by the Court of Appeals' statement that, if petitioner's conviction were proper, this suit would in all likelihood be barred by res judicata. The res judicata effect of state-court decisions in § 1983 actions is a matter of state law.

Heck, 512 U.S. at 480 n. 2 (citation and internal quotations omitted). The Court again referred to the application of res judicata later in the opinion: "Regardless of the state law concerning res judicata, see n. 2, *supra*, the § 1983 action will not lie." *Id.* at 486 n. 6.

Matters determined in a state court proceeding are entitled to the same preclusive effect in a subsequent federal suit as they enjoy in the state where the decision was rendered. "[A] federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984). In *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), this Court stated:

> Indeed, though the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so.

449 U.S. at 96. *See also McCoy v. Hernandez*, 203 F.3d 371, 374 (5th Cir. 2000). In *Allen*, *supra*, this Court held that an arrestee's civil rights action against the police was barred under state law where the existence of probable cause for the arrest had previously been determined in the state criminal proceedings. Accordingly, in this litigation, the preclusive effect of the previous determinations of probable cause for Rheams' arrest are governed by Louisiana law.

In connection with the arrest of Rheams, two separate sets of arrest warrants were issued. Deputy Marler and Trooper Poe acted pursuant to an attempted murder warrant at the time of their confrontation with Rheams. While in the process of executing the warrant, Rheams attempted to run over the officers with his vehicle. Judge

Guidry issued an Arrest Warrant against Rheams on two counts of attempted first degree murder. Additionally, the East Baton Rouge Parish District Attorney's Office filed a bill of information against Rheams on October 16, 2001, charging him with two counts of attempted first degree murder. Similarly the Grand Jury cleared the officers of wrongdoing in connection with the shooting by returning a no true bill. Respondent respectfully submits that the finding of probable cause by Judge Guidry in conjunction with his issuance of the Arrest Warrant and the determination of probable cause by the District Attorney's Office in conjunction with the filing of the Bill of Information and the return of a no true bill against the officers by the Grand Jury are binding in these proceedings and bar and preclude Petitioners' claims of false arrest and excessive force.

Courts throughout the country have recently been faced with the issue of what effect, if any, a finding of probable cause in a criminal proceeding has on a subsequent civil action for false arrest, false imprisonment, or malicious prosecution. A vast majority of the courts have ruled that **the determination of the existence of probable cause in a criminal proceeding**, either as a result of a conviction or as a result of a motion to suppress or a motion for preliminary examination, **is binding in a civil action and bars and precludes a civil claim for false arrest/imprisonment and malicious prosecution**. Some courts dismiss the civil claim on the grounds of res judicata, issue preclusion, or collateral estoppel. Other courts base their dismissal on the fact that the plaintiff has no cause of action for false arrest where there has been a prior determination of probable cause, ruling that the absence of probable cause is a necessary element of

such a claim. Other courts take an evidentiary approach to the resolution of the issue by holding that the prior determination of probable cause in the criminal proceedings is "conclusive proof" as to the existence of probable cause in the civil proceedings.

The underlying rationale of either of these approaches is that where the question of probable cause has been determined in the criminal proceedings, the civil court should not "second guess" the findings of the criminal court, which was in a much better position to assess and determine whether probable cause existed. The relevant jurisprudence on this issue is explored in the following pages of this Memorandum.

The jurisprudence is clear that a finding of guilt in a criminal proceeding, whether by trial or plea, constitutes an **absolute defense** to an action for false arrest on the charges. *Heck v. Humphrey; Krueger v. Reimer*, 66 F.3d 75 (5th Cir. 1995); *Wells v. Bonner*, 45 F.3d 90 (5th Cir. 1995); *Restrepo v. Fortunato*, 556 So.2d 1362 (La. App. 5th Cir. 1990), *writ denied,* 560 So.2d 11 (La. 1990); *Williams v. DiVittoria*, 777 F.Supp. 1332 (E.D. La. 1991); *Dukes v. State of New York*, 743 F.Supp. 1037 (S.D.N.Y. 1990); *Grochowski v. Commonwealth of Virginia,* 741 F.Supp. 1230 (W.D. Va. 1990); *O'Leary v. Luongo*, 692 F.Supp. 893 (N.D. Ill. 1988).

A **conviction** on the charges, however, **is not a necessary prerequisite** in order for the criminal proceedings to have a preclusive effect in the civil proceedings. Something less than a final judgment of conviction may operate as an absolute bar to the plaintiff's false arrest claim on the charges. For example, in *Courtney v. Rice*, 546 N.E.2d 461 (Ohio App. 1988), the court held that

a conviction of the plaintiff constituted an absolute defense to claims of false arrest, **even though the conviction was subsequently reversed on appeal.** A similar result was reached in *Losee v. Dearinger*, 911 F.2d 48 (8th Cir. 1990), and *Elbrader v. Blevins*, 757 F.Supp. 1174 (D. Kan. 1991).

A finding of probable cause in an **interlocutory ruling** also serves as an absolute defense to a false arrest claim. *Williams v. DiVittoria*, *supra*; *Zanghi v. Incorporated Village of Old Brookville*, 752 F.2d 42 (2nd Cir. 1985); *Terrones v. Allen*, 680 F.Supp. 1483 (D. Colo. 1988). In *Zanghi*, *supra*, George Zanghi was arrested for driving while intoxicated, and his driver's license was temporarily suspended. Under New York Vehicle and Traffic Law, a driver charged with driving while intoxicated may have his license temporarily suspended immediately, followed by an administrative hearing to be held within fifteen (15) days of arraignment to determine if revocation of the license for six (6) months should be imposed. At Zanghi's administrative hearing, the administrative law judge found that there were reasonable grounds to arrest Zanghi for driving while intoxicated and therefore revoked Zanghi's driver's license for six (6) months. Zanghi was ultimately **acquitted by a jury** on the drunken driving charges and instituted a false arrest action against the arresting officers and the police department. Despite the fact that Zanghi was **found innocent** of the drunken driving charges, the court dismissed the false arrest claims based on res judicata.

In *Terrones v. Allen*, *supra*, Terrones, like Zanghi, was arrested for driving while intoxicated, and his driver's license was temporarily suspended at the time of his arrest. At his license revocation hearing, the hearing

officer found that probable cause existed for the arrest and revoked Terrones' driving privileges for a period of one (1) year. The district attorney's office admitted that the breath alcohol test administered to Terrones had been obtained as a result of an unlawful stop and detention and dismissed the drunken driving charges due to the lack of admissible evidence. In Terrones' subsequent civil action for false arrest, the court gave res judicata effect to the hearing officer's finding of probable cause and dismissed the civil action even though Terrones was **not convicted** on the charges. *See also Hugar v. Nigro*, 616 N.Y.S.2d 833 (A.D. 4 Dept. 1994) (administrative determination that plaintiff violated traffic law conclusive proof for plaintiff's arrest and detention).

Several courts have had the opportunity to specifically address the issue of whether a finding of probable cause in a **preliminary examination hearing** bars a subsequent civil claim, even though the charges are ultimately dismissed or the criminal defendant is acquitted. In *Hubbert v. City of Moore, Oklahoma*, 923 F.2d 769 (10th Cir. 1991), probable cause for the arrest of a woman for assault with a dangerous weapon was found at her preliminary hearing. However, the woman was later **acquitted** after a jury trial. She then filed a civil rights lawsuit against the arresting officers for false arrest without probable cause. The Tenth Circuit ruled that it had been **conclusively** determined at the preliminary hearing that the officers had probable cause to make the arrest and they were therefore entitled to qualified immunity from liability. *See also, Haupt v. Dillard*, 17 F.3d 285, 289-90 (9th Cir. 1994); *Coogan v. City of Wixom*, 820 F.2d 170, 175 (6th Cir. 1987); *Smith v. Thornburg*, 136 F.3d 1070 (6th Cir. 1998).

In *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), an arrestee sought to suppress certain evidence against him on the ground that it had been obtained in violation of the Fourth Amendment. The court denied the motion to suppress. The arrestee then brought a § 1983 suit in federal court against the arresting officers. This Court held the suit barred by collateral estoppel because the issue of a Fourth Amendment violation had been resolved against the plaintiff by the denial of his suppression motion in the criminal court.

In *Adamson v. Dayton Hudson Corp.*, 774 P.2d 478 (Okl. App. 1989), the Oklahoma Court of Appeals held that a finding of probable cause at an accused shoplifter's preliminary hearing barred her from relitigating the question of probable cause in a later suit for false arrest, when she had a "full and fair opportunity" to litigate the question of probable cause at the preliminary hearing. Similarly, in *Losee v. Dearinger*, 911 F.2d 48 (8th Cir. 1990), a passenger in a vehicle was arrested when the vehicle in which he was riding was stopped by the police and a search of the vehicle and its occupants uncovered shotguns and shotgun shells. Pre-trial and trial motions to suppress were filed on behalf of the passenger and were denied. The passenger was initially convicted on charges of possession of a firearm by a convicted felon. On appeal, however, **the conviction was reversed**, with the state appeal court finding that the officers did not have a reasonably articulable suspicion on which to base their investigatory stop of the car. The passenger then filed a federal civil rights action against the officers for violation of his Fourth Amendment rights.

The United States Court of Appeals for the Eighth Circuit held that the officers were entitled to qualified

immunity despite the reversal of the criminal conviction. The officers could only be liable, the court pointed out, if they should have known that their actions were unlawful. In the criminal case, two different trial judges denied pre-trial motions to suppress. The appellate court opined that it could not hold that the officers should have known their actions were improper when two judges trained in the law found their actions constitutionally permissible.

The United States Court of Appeals for the Ninth Circuit held that an arrestee was barred from going forward with his false arrest claims because of the determination, during his criminal trials, that no Fourth Amendment violations took place during his arrest. *Ayers v. City of Richmond*, 895 F.2d 1267 (9th Cir. 1990). In *Ayers*, *supra*, the claimant was arrested and charged with possession of marijuana and a concealed weapon in his automobile, as well as several other charges. He was arrested again and charged with possession of a concealed weapon and a loaded firearm. After the trial court denied the claimant's motions to suppress, he pled guilty to possession of a concealed weapon. He subsequently filed a civil rights action alleging false arrest. His false arrest claims were barred, the Ninth Circuit determined, since the question of probable cause was "fully and fairly" litigated in the criminal proceedings and the plaintiffs had the motivation to fully litigate the Fourth Amendment claims.

It is interesting to note that the *Ayers* court found that the finding of probable cause in conjunction with **motions to suppress** precluded plaintiff's claim for false arrest, when it could just have easily have found that the plaintiff's **conviction** on the criminal charges precluded him from asserting a false arrest claim. As noted previously in

this Memorandum, a criminal conviction, whether by trial or plea, constitutes an absolute defense to an action for false arrest. *Heck; Dukes v. State of New York*, *supra*; *Grochowski v. Commonwealth of Virginia*, *supra*; *Restrepo v. Fortunato*, *supra*; *O'Leary v. Luongo*, *supra*.

Until recently, the law in Louisiana as to the effect a conviction on criminal charges or a determination of probable cause in a criminal proceeding has on the accused's subsequent civil claim for false arrest was unsettled. The inapplicability of issue preclusion or collateral estoppel in Louisiana and the restrictive application of res judicata under the civil law rendered these defenses and theories unavailable, at least under the law as it existed prior to 1991, for the resolution of the issue. *See Vicknair v. Hibernia Building Corp.*, 479 So.2d 904 (La. 1985); *Safeco Ins. Co. of America v. Palermo*, 436 So.2d 536 (La. 1983); LSA-R.S. 13:4231 (prior to 1991 amendment).

In *Restrepo v. Fortunato*, 556 So.2d 1362 (La. App. 5th Cir. 1990), *writ denied*, 560 So.2d 11 (La. 1990), the court held that a plaintiff has **no cause of action** for false imprisonment based on the arrest for the crime for which he was **convicted**, as he cannot, as a matter of law, prove his detention was unlawful.[2] *See also*, *Thomas v. Frederick*, 766 F.Supp. 540 (W.D. La. 1991) (conviction serves as

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[2] *Cf. Touchton v. Kroger Co.*, 512 So.2d 520 (La. App. 3rd Cir. 1987) (Where a plaintiff alleges that police officers are liable for false arrest, the plaintiff bears the burden of proof to show that the arrest was made without probable cause and must allege detailed facts which show that the arrest was made without probable cause. This is an element of the plaintiff's cause of action. Where a plaintiff fails to allege specific facts from which it can be concluded that probable cause did not exist, the exception of no cause of action is properly granted.).

bar to action for false arrest or malicious prosecution, even though there is an unexercised right of appeal, and even where conviction was obtained by perjury or other fraud upon the court); *Rabalais v. Blanche*, 524 So.2d 772 (La. App. 3rd Cir. 1988) (guilty plea precludes malicious prosecution action). In *Williams v. DiVittoria*, *supra*, the United States District Court for the Eastern District of Louisiana held that the determination of probable cause in a **preliminary examination hearing does bar** a subsequent civil claim for false arrest under both the Civil Rights Act and state law, as the plaintiff is precluded, as a matter of law, from contesting the lawfulness of his arrest, detention, and prosecution.

Restrepo and *DiVittoria* were decided under the "old law" of res judicata as it existed prior to 1991. Prior to 1991, as noted above, the civil law and courts looked disfavorably upon res judicata (and the related doctrines of issue preclusion and collateral estoppel), and the Louisiana courts applied the bar of res judicata sparingly. However, the law pertaining to preclusion of claims was drastically changed by the passage of Acts 1990, No. 521, § 1. This amendment, which became effective on January 1, 1991, substantially broadened Louisiana's res judicata statute, LSA-R.S. 13:4231. The statute now provides as follows:

> **§ 4231. Res judicata**
>
> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
>
> (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final

> judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment;
>
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action;
>
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

As indicated by Comment (b) to the statute, res judicata has been liberally broadened to include the principle of issue preclusion, previously not recognized under Louisiana law. The official Comment makes the following observation: "R.S. 13:4231 also changes the law by adopting the principle of issue preclusion." Accordingly, under the current status of the law, in addition to there being no cause of action for false arrest, the doctrine of res judicata (including collateral estoppel and issue preclusion) operates to bar a false arrest claim when there has been a prior determination of probable cause on the charges.

Restrepo, DiVittoria, Heck, and LSA-R.S. 13:4231, as amended, are controlling with regard to the allegations of the present litigation that Rheams was falsely arrested on September 21, 2000. The undisputed facts of this case show that Judge Guidry issued a Warrant for the arrest of Rheams based on his finding of probable cause, the District Attorney's Office filed a Bill of Information against

Rheams charging him with two counts of attempted first degree murder, and the Grand Jury returned a no true bill against the officers. Accordingly, these prior determinations of probable cause bar Petitioners' claims of false arrest in the present action under the doctrine of res judicata.

IV. THE BILL OF INFORMATION IS PRIMA FACIE EVIDENCE OF PROBABLE CAUSE

As noted previously, the East Baton Rouge District Attorney's Office filed a Bill of Information against Rheams on October 16, 2001, charging him with two (2) counts of attempted first degree murder. It is respectfully submitted that this indictment precludes Petitioners' claims in the present litigation.

Under the majority rule, the filing of a bill of information is prima facie evidence of probable cause. "Prima facie probable cause" is established by the filing of a bill of information by the district attorney, but it is not conclusive evidence of probable cause. Prima facie probable cause may be rebutted by evidence that the bill of information was obtained by fraud, perjury, or other corrupt means. Restatement (Second) of Torts § 664(2) (1972); 52 Am.Jur.2d *Malicious Prosecution* § 117 (1970); 54 C.J.S. *Malicious Prosecution* § 35 (1948); Annotation, *Malicious Prosecution: Effect of Grand Jury Indictment on Issue of Probable Cause*, 28 A.L.R.3d 748, 753 (1969). *See also*, *Marcum v. Sagehorn*, 660 S.W.2d 426, 429 (Mo.App. 1983) (filing of bill of information by District Attorney is prima facie evidence of probable cause for prosecution); *Ulmer v. Associated Dry Goods Corp.*, 823 F.2d 1278, 1282 (8th Cir. 1987); *Stainer v. San Luis Valley Land & Mining Co.*, 166

F. 220 (8th Cir. 1908); *Cf. Gladding Chevrolet, Inc. v. Fowler*, 287 A.2d 280 (Md.App. 1972) (return of indictment by Grand Jury is prima facie evidence of probable cause); *Freides v. Sani-Mode Manufacturing Co.*, 211 N.E.2d 286 (Ill. 1965); *McMillian v. Johnson*, 878 F.Supp. 1473 (M.D.Ala. 1995); *Lumpkin v. Cofield*, 536 So.2d 62 (Ala. 1988); *Hardge-Harris v. Pleban*, 741 F.Supp. 764 (E.D. Mo. 1990); *Dukes v. City of New York*, 879 F.Supp. 335 (S.D.N.Y 1995); *Cox v. County of Suffolk*, 827 F.Supp. 935 (E.D.N.Y. 1993); *Bernard v. United States*, 25 F.3d 98 (2nd Cir. 1994); *White v. Frank*, 855 F.2d 956 (2nd Cir. 1988); *Gatter v. Zappile*, 67 F.Supp.2d 515 (E.D. Pa. 1999), *aff'd*, 225 F.3d 648 (3rd Cir. 2000); *Friedman v. U.S.*, 927 F.2d 259 (6th Cir. 1991); *Kelly v. Serna*, 87 F.3d 1235 (11th Cir. 1996); *Shepard v. Byrd*, 581 F.Supp. 1374 (N.D. Ga. 1984) (return of indictment immunizes arresting officer).

Where a claimant has been indicted on criminal charges, he must, in his complaint, plead facts showing fraud or other improprieties in the indictment proceedings in order to overcome the presumption of probable cause arising from his indictment. Should a claimant fail to allege fraud or other improprieties in the indictment process, his claims for false arrest must fail. *See Bernard, supra* at 104; *Lumpkin, supra* at 64. *See also Patterson v. J.M. Armatys*, 808 F.Supp. 550 (E.D. Tex. 1992).

Some courts have held that an indictment breaks the chain of causation of an arrestee's claim. In *Taylor v. Gregg*, 36 F.3d 453, 456 (5th Cir. 1994), the Fifth Circuit held that the chain of causation for false arrest is broken by the return of an indictment by a grand jury, unless it can be shown that the deliberations of the grand jury were in some way tainted by fraudulent and corrupt practices of the defendant. The Fifth Circuit held in *Rodriguez v.*

Ritchey, 556 F.2d 1185 (5th Cir. 1977) (en banc), that even an officer who acts with malice in procuring a warrant or indictment will not be liable if the facts supporting the warrant or indictment are put before an impartial intermediary, such as a magistrate or grand jury, as that intermediary's "independent" decision to issue a warrant or return an indictment "breaks the causal chain and insulates the initiating party." *Id.* at 1193. *See also Smith v. Gonzales*, 670 F.2d 522, 526 (5th Cir. 1982); *Thomas v. Sams*, 734 F.2d 185, 191 (5th Cir. 1984); *Taylor v. Meacham*, 82 F.3d 1556, 1564 (10th Cir. 1996); *Reed v. City of Chicago*, 77 F.3d 1049, 1053 (7th Cir. 1996) ("[C]hain of causation is broken by an indictment, absent an allegation of pressure or influence exerted by the police officers, or knowing misstatements made by the officers to the prosecutor."); *Senra v. Cunningham*, 9 F.3d 168, 173 (1st Cir. 1993).

Based on these authorities, the Bill of Information issued by the District Attorney's Office, as well as the no true bill returned by the Grand Jury clearing the officers of criminal wrongdoing, bars Petitioners' claims of false arrest and excessive force in the present action.

CONCLUSION

It is respectfully submitted that the various judicial and quasi-judicial findings of probable cause made in the criminal proceedings against Rheams conclusively establish the existence of probable cause for his arrest and the reasonableness of the force used by Deputy Marler and Trooper Poe in apprehending Rheams. For this reason, dismissal of the present action was warranted.

There were no extraordinary circumstances alleged in Petitioners' Petition for Writ of Mandamus filed in the Fifth Circuit, nor are any alleged in the Petition for Writ of Certiorari presently before this Court. In essence, Petitioners filed the mandamus proceeding in an attempt to bring the dismissal order before the Fifth Circuit Court of Appeals on an expedited basis. Delays are an unfortunate incident of the litigation process.

For the reasons set forth above, the ruling of the appellate court is correct. Accordingly, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

SCOTT G. VINCENT
530 Natchez Street, Suite 325
New Orleans, Louisiana 70130
Telephone: (504) 596-2131
La. Bar Code: 14478

Attorney for Respondent
Tri-Parish Task Force

APPENDIX

WALTER JAMES RHEAMS through his duly qualified curator, HELEN RHEAMS, TAMMY RHEAMS, individually JAMILAH MONET RHEAMS, through ALISHA MONIQUE THOMAS v. OFFICER VICTOR MARLER **********	CIVIL ACTION NO: 00-112-D-2 MIDDLE DISTRICT OF LOUISIANA UNITED STATES DISTRICT COURT JUDGE BRADY MAGISTRATE NOLAND

NOTICE OF APPEAL
TO FIFTH CIRCUIT COURT OF APPEAL
ON ALL ISSUES

(Filed April 11, 2002)

NOW INTO COURT, through undersigned counsel, come the Plaintiffs, who respectfully hereby give notice of appeal to the United States Court of Appeals for the Fifth Circuit, pursuant to the *Judgment* entered April 1, 2002, dismissing the above captioned matter in entirety.

The rulings from which this appeal is taken are all issues disposed of by the *Judgment*. There was no transcript made of any hearing affecting the *Judgment* at issue.

This appeal is taken by "all plaintiffs."

The parties to the judgment, orders or decrees appealed from and the names of and addresses of their respective attorneys are as follows:

Officer Victor Marler
Mr. Edwin L. Hightower
Mr. John Dale Powers
Powers & Williard
Attorneys at Law
7967 Office Park Boulevard
Post Office Box 15948
Baton Rouge, LA 70895

Livingston Parish Sheriff's Office and Officer Victor Marler, Individually
Mr. Eric L. Pittman
Eric L. Pittman & Associates
Attorneys at Law
1930 Florida Avenue, SW
Denham Springs, LA 70726

Tri-Parish Task Force
Mr. Scott G. Vincent
Attorney at Law
530 Natchez Street, Suite 325
New Orleans, LA 70130

Sheriff Elmer Litchfield and Captain Don Strickland
Ms. Leu Ann Lester Greco
Greco & Greco
Attorneys at Law
522 Europe Street
Baton Rouge, LA 70802

State of Louisiana, through the Department of Public Safety, Office of the Louisiana State Police
Mr. Willie E. Broome
Attorney at Law
Department of Public Safety
Office of State Police
Post Office Box 66614, Mailslip #11
Baton Rouge, LA 70896

Ms. Kathy D. Williams
Attorney at Law
Department of Public Safety
Post Office Box 66614
Baton Rouge, LA 70896

The United States of America, through the Federal Bureau of Investigation Special Agent Larry Jones and Jason Poe
James L. Nelson
Office of the U.S. Attorney
Middle District of Louisiana
777 Florida Street, Suite 208
Baton Rouge, LA 70801

May this notice of appeal be deemed proper in the premises.

Respectfully submitted,

/s/ Donna U. Grodner
DONNA U. GRODNER (20840)
JAMES W. STANDLEY, IV (27297)
GRODNER & ASSOCIATES
2223 Quail Run Drive, Suite B-1
Baton Rouge, Louisiana 70808
Telephone: (225) 769-1919
Facsimile: (225) 769-1997

CERTIFICATE

I hereby certify that I have caused the above and foregoing to be served on all counsel of record as listed below, this 8th day of April, 2002.

/s/ Donna U. Grodner
DONNA U. GRODNER

Mr. Edwin L. Hightower
Mr. John Dale Powers
Powers & Williard
Attorneys at Law
7967 Office Park Boulevard
Post Office Box 15948
Baton Rouge, LA 70895

Mr. Eric L. Pittman
Eric L. Pittman & Associates
Attorneys at Law
1930 Florida Avenue, SW
Denham Springs, LA 70726

Mr. Scott G. Vincent
Attorney at Law
530 Natchez Street, Suite 325
New Orleans, LA 70130

Mr. Hillar Moore
Attorney at Law
6513 Perkins Road
Baton Rouge, LA 70808

Ms. Leu Ann Lester Greco
Greco & Greco
Attorneys at Law
522 Europe Street
Baton Rouge, LA 70802

Mr. Willie E. Broome
Attorney at Law
Department of Public Safety
Office of State Police
Post Office Box 66614, Mailslip #11
Baton Rouge, LA 70896

Ms. Tammy Pruet Northrup
Attorney at Law
Department of Public Safety
Post Office Box 66614, Mailslip #11
Baton Rouge, LA 70896

Mr. Antonio "Tony" Clayton
Attorney at Law
607 N. Alexander Avenue
Port Allen, LA 70767

James L. Nelson
Office of the U.S. Attorney
Middle District of LA
777 Florida Street, Suite 208
Baton Rouge, LA 70801